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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

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No. 325

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LOUIS A. NEGRE,

v.

STANLEY R. LARSEN, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF ON BEHALF OF PETITIONER

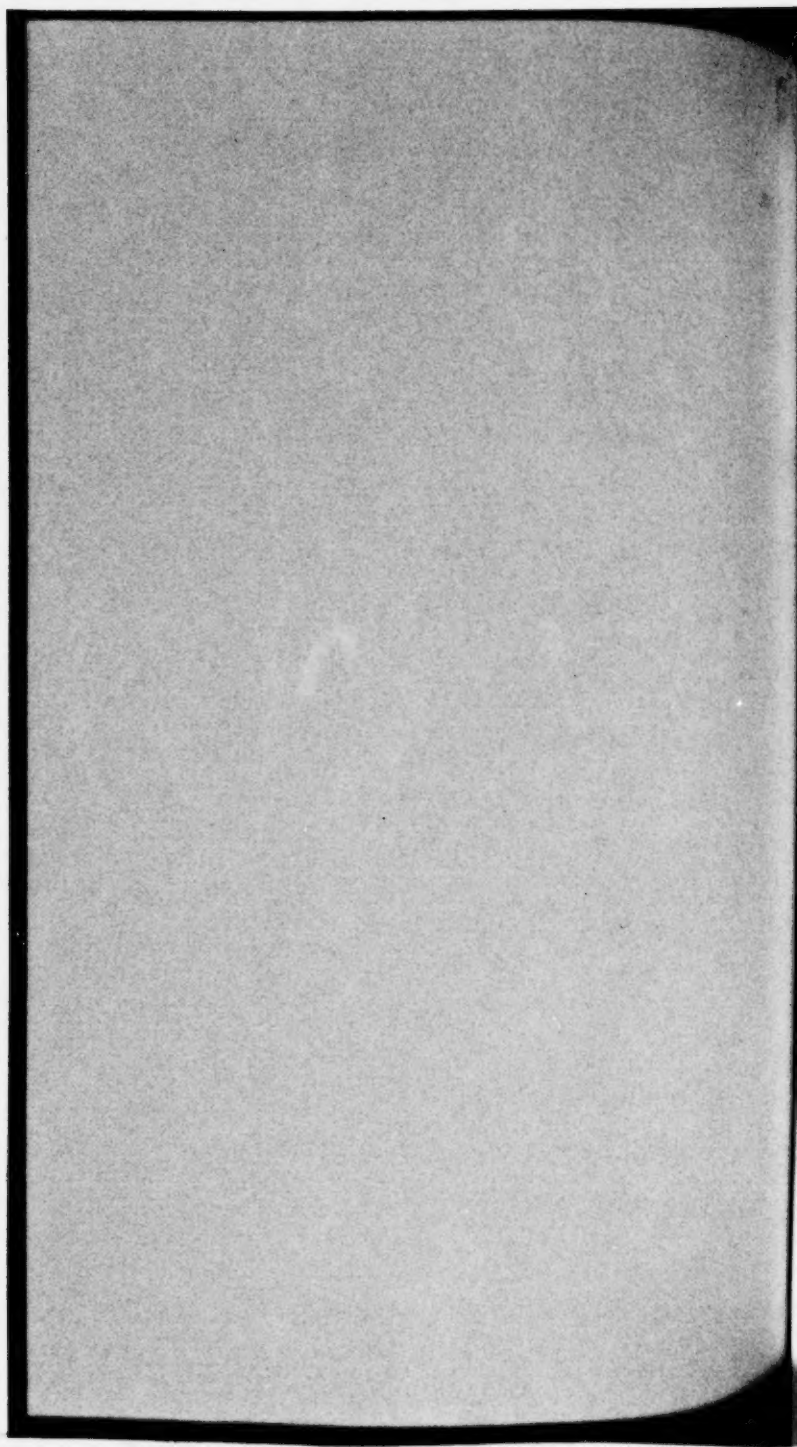
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In The  
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ata in Reply Brief on Behalf of Petitioner

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page 7 insert after line 23:  
discriminate between just wars in which he  
has a religious duty to

page 8 line 12 insert "speak" for "speech"

page 16 penultimate line after "men" insert:  
applying for and receiving conscientious ob-  
jector status is insignificant compared to  
the number of men

page 17 line 8 insert "113" for "111"

page 17 line 19 insert "contrast" for "contract"

page 17 line 24 insert "Judaeo-" for "Judea"

page 17 line 25 insert "revelation" for  
"revelations"

(ii)

United States ex rel Beatty v. Healy, 424 F.2d 299 (5th Cir. 1970) . . . . .	9
United States ex rel. Brooks v. Clifford, 409 F.2d 700, 708 (4th Cir. 1969) . . . . .	12
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United States v. Kauten, 133 F.2d 360 (8th Cir. 1969) . . . . .	10, 18
United States v. Kessler, 406 F.2d 151 at 155 (5th Cir. 1969) . . . . .	11
United States v. Macintosh, 283 U.S. 605 (1931) . . . . .	12, 24, 25
United States v. McFadden, 309 F. Supp. 502 (N.D. Cal. 1970) . . . . .	10
United States v. Seeger, 380 U.S. 163 at 185 (1965) . . . . .	16, 18, 19
United States ex rel. Sheldon v. O'Malley, 420 F.2d 1344, 1349-1950 (D.C. Cir. 1969) . . . . .	12
Welsh v. United States, 398 U.S. 333 at 340-341 (1970) . . . . .	11, 12

*Statutes:*

Military Selective Service Act of 1967, § 6(j), 50 U.S.C. App. § 456(j) . . . . .	9
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*Texts:*

Baltimore Catechism 147-48 (Official Revised Edition; 1949) . . . . .	14
Declaration of Religious Freedom I:3, in Documents of Vatican II 681 (1966) . . . . .	13
John Tracy Ellis, American Catholicism p. 38 (Image Books Edition 1965) . . . . .	21, 22
Jerome, On Titus 3:1, 26 Patrologia Latina 626 (Ed. J.P. Migne) . . . . .	13
3 Ligouri Theologia Moralis no. 408 (1825) . . . . .	14
Pastoral Constitution on the Church in the Modern World . . . . .	4
Pope John XXIII Pacem in Terris, Part II . . . . .	5
Pope Paul VI and the Fathers of the Sacred Council Dogmatic Constitution on the Church (Lumen Gentium) November 21, 1964 . . . . .	8

(iii)

The Christmas Message of Pope Pius XII to the Whole World, 1956, The Contradiction of Our Age, The Pope Speaks, III (Spring 1957, pp. 342-344) . . . . .	5
Selective Service in Wartime, Second Report of the Director of Selective, 1941-42, 256, 258 (April 3, 1943) . . . .	26
Francisco Victoria, Relectio VI de Indis, sive De jure belli Hispanorum in barbaros 435-37 (ed. Simon in The Classics of International Law; 1917) . . . . .	14
<i>Miscellaneous:</i>	
Statistical Abstract of the United States 1970, p. 262 . . . . .	16
Selective Service System Monograph No. 11, Conscientious Objection (1950) . . . . .	19, 20

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Argument in the government brief is divided into two propositions:

I. The government contends that Congress intended to deny exemption from military service to men prohibited therefrom by conscience formed under religious training and belief which forbids participation in wars defined as "unjust" by application of various tests fixed by their religion.

Upon examination it appears that point I of the government brief herein is contradicted by the Congressional history it refers to, and that case authority the government relies upon has been rejected both by Congress and by the Supreme Court.

II. The government asserts "all persons who are in a broad sense 'religiously' opposed to war in any form are entitled to the exemption, whether their views be a matter of church doctrine, nontheistic religious teaching or individual conscience independently developed. No religion is favored; none is discriminated against; none is established." (Brief for the United States p. 24).

Upon examination it is clear that the foregoing allegation of "neutrality" fails completely, because the government position requires any Catholic—in order to qualify for exemption from military service in the government's contention—to abandon a cardinal tenet of his religion: To wit, that the teaching of the Church (as voiced by the Pope and the Fathers and Doctors of the Church) is binding upon each Catholic in matters of faith and morals.

The government's asserted neutrality fails completely because the Catholic Church teaches that a Catholic has a moral duty to take part in wars declared by his government which comply with the tests fixed by his religion for just wars. The religious duty to participate in "just" wars is as binding upon the conscience of the Catholic as his religious duty to refuse to participate in wars he perceives in conscience as "unjust". (We place "just" and "unjust" in quotation marks, because the religious doctrine of the Catholic Church is much more precise in defining the conditions under which participation in war is proper.)

Indeed, the debate over the binding character of the teaching of the Church and the Holy Father in matters of faith and morals was one of the specific issues which brought on the Protestant Reformation in which the Protestant sects denied the religious authority of the Church and the Pope.

The Thirty Years War is only one example of protracted civil disorder brought on when governments insist upon penalizing citizens who won't confess to the religion approved by the state.

We will answer the government assertions in the opposite order from that used in the government brief, because clari-

fication of the religious issue makes it clear why Congress did not entertain the intention the government seeks to attribute to Congress: to discriminate against Catholics by denying objectors of the Catholic faith exemption from military service unless such Catholics deny that the teaching of the Church and the Pope is binding upon such Catholics.

## ARGUMENT

### I

**THE CATHOLIC CHURCH TEACHES THAT ITS MEMBERS HAVE A RELIGIOUS DUTY TO PARTICIPATE IN JUST WARS. THIS DUTY IS EQUALLY BINDING UPON THE CONSCIENCE OF THE CATHOLIC AS THE RELIGIOUS DUTY TO REFUSE TO PARTICIPATE IN UNJUST WARS. THE CONSTRUCTION OF THE SELECTIVE SERVICE ACT PROPOSED BY THE GOVERNMENT IF ACCEPTED WOULD CONSTITUTE AN INVIDIOUS DISCRIMINATION AGAINST CATHOLICS BECAUSE IT WOULD REQUIRE CATHOLICS TO ABANDON A CARDINAL TENET OF THEIR RELIGION TO BECOME ELIGIBLE FOR EXEMPTION FROM MILITARY SERVICE: NAMELY, THE GOVERNMENT DEMANDS THAT A CATHOLIC OBJECTOR DENY THAT THE TEACHING OF THE CHURCH AND THE POPE IS BINDING UPON HIS CONSCIENCE IN RESPECT OF SERVICE IN WAR.**

### A.

The government admits as it must that petitioner Negre objects to participation in any form in the war in which he was ordered to serve by reason of his Catholic religious training and belief. (Brief for the United States p. 25.) The government insists however that his objection which admittedly arises from religious training and belief should be disregarded as merely "political" because Catholic religious doctrine distinguishes between just and unjust war, and because Negre subscribes to belief in the Catholic religion.

In fact Negre's disqualification from conscientious objection status under the government's contention arises precisely because Negre stubbornly persists in the position:



"Petitioner stated that he accepted 'the teaching of His Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon [his] conscience \* \* \*' (N. App. 10)." (Brief for the United States p. 6.)

The government purports to misunderstand the statement at the end of Negre's application:

"At the end of his application, petitioner added, without any elaboration, that at present 'he could not conceive of participation in any war.' (N. App. 14)." Brief for the United States p. 8.

The elaboration is obvious from the very passage of the Pastoral Constitution on the Church in the Modern World cited by Negre, to wit paragraph 79 which states:

"Certainly war has not been rooted out of human affairs. As long as the danger of war remains and there is no competent and sufficiently powerful authority at the international level, governments cannot be denied the right to legitimate defense once every means of peaceful settlement has been exhausted. Therefore, government authorities and others who share public responsibility have the duty to protect the welfare of the people entrusted to their care and to conduct such grave matters soberly.

\* \* \* \* \*

Those who are pledged to the armed service of their country as members of its armed forces should regard themselves as agents of security and freedom on behalf of their people. As long as they fulfill this rule properly, they are making a genuine contribution to the establishment of peace."

Thus, "the teaching of His Holiness Pope Paul VI as announced in the Pastoral Constitution [and] binding upon [Negre's] conscience" does not proscribe all war but sanctions "wars of legitimate defense once every means of peaceful settlement have been exhausted."

Pope Pius XII is even more explicit that a Catholic has a religious duty to comply with the command of the state

and participate in wars in which the theological tests (often subdivided into five) fixed by the Catholic religion for just war have been met:

"There is no longer room for doubt concerning the aims and methods which rely on tanks, when these latter noisily crash over borders and sow death in order to force civilian peoples into a pattern of life which they explicitly detest; when—destroying, as it were, the stages of possible negotiation and mediation—the threat of using atomic weapons is employed to gain certain demands, be they justified or not.

"It is clear that in present circumstances there can be verified in a nation a situation, wherein, after every effort to avoid war has been expended in vain, war—for effective self-defense and with the hope of a favorable outcome against unjust attack—could not be considered unlawful.

"If therefore, a body representative of the people and a government—both having been chosen by free elections—in a moment of extreme danger decide, by legitimate instruments of internal and external policy, on defensive precautions and carry out the plans which they consider necessary, they do not act immorally. Therefore a Catholic citizen cannot invoke his own conscience in order to refuse to serve and fulfill those duties the law imposes. On this matter we are in perfect harmony which Our Predecessors, Leo XIII and Benedict XV, who never denied that obligation, but lamented the headlong armaments race, and the moral dangers accompanying barracks life, and urged, as We do likewise, general disarmament as an effective remedy." The Christmas Message of Pope Pius XII to the Whole World, 1956, *The Contradiction of Our Age, The Pope Speaks*. III (Spring 1957, pp. 342-344).

The theological basis of the Catholic duty to obey the command of the state and participate in a just war is clearly explicated by Pope John XXII in Part II of *Pacem in Terris* from which Negre cites paragraph 51.

"46. Human society can be neither well-ordered nor prosperous unless it has some people invested with legitimate authority to preserve its institutions. . . . These however derive their authority from God, as St. Paul teaches in the words, Authority comes from God alone. [Rom. 13, 1-6] These words of St. Paul are explained thus by St. John Chrysostom: \* \* \* What I say is, that it is the divine wisdom and not mere chance, that has ordained that there should be government, that some should command and others obey.

\* \* \* \* \*

"50. \* \* \* When in fact, men obey their rulers it is not at all as men that they obey them, but through their obedience it is God, the provident Creator of all things, Whom they reverence, since He has decreed that men's dealings with one another should be regulated by an order which He himself has established."

Continuing, John XXIII taught, and Negre learned:

"51. Since the right to command is required by the moral order and has its source in God, it follows that if civil authorities pass laws or command anything opposed to the moral order and consequently contrary to the will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens, since God has more right to be obeyed than men."

Negre's legal problem vis-a-vis the government is not that Negre foresees some war coming up in which he conceives he might participate because Negre asserted without contradiction:

"At present I feel that I could not conceive of participation in any war."

The defect in Negre's views in the government's analysis is that he accepted "the teaching of His Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon [his] conscience \* \* \*." (N. App. 10) cited in Brief for the United States p. 6. And the particular trouble with Pope Paul VI and the Pastoral Constitution is that noted by

the hearing officer, namely, that Paul VI and the Fathers of the Sacred Council can conceive of just wars and that Negre if he remains a Catholic will have a duty as a Catholic to participate in any such wars if they ever occur. The Army hearing officer observed:

"Pope Paul is also concerned with the 'type' of war. \* \* \* The war that concerned the Pope was a war of aggression rather than one of defense. He felt that destruction of cities was a crime against God if it would serve no purpose. The war effort must not be indiscriminate. Pope Paul did not pass on the morality of a defensive war or the indiscriminate bombing of military targets." (N. App. 38-390.)

The hearing officer is wrong in his last sentence because the Pastoral Constitution expressly sanctions defensive war conducted by proper means, and expressly proscribes indiscriminate bombing and destruction visited upon civilian populations. But although the phrasing of Captain Van Wert, the hearing officer, in the last sentence was not quite right theologically, Captain Van Wert was correct in capturing the theological gist of the teaching of Paul VI in the Pastoral Constitution that a Catholic has a religious duty to participate and unjust wars in which he has a religious duty to refuse to participate.

Negre thus finds himself in the position that he personally cannot presently conceive of participation in any war, but in all humility he accepts the teaching of the Catholic Church and its Supreme Pontiff, Paul VI, that a just war may occur under modern conditions and that if it does so he has a religious duty to participate therein.

The government assertion that the law is neutral among religions implies in that statement that Negre may render himself eligible for conscientious objector status by the simple expedient of denying that "the teaching of his Holiness Pope Paul VI as announced in the Pastoral Constitution [is] binding upon [Negre's] conscience \* \* \* (N. App. 10)." Brief for the United States p. 6.

Negre is of course theologically free to deny that the teaching of the Fathers of the Sacred Council as confirmed by Pope Paul VI is binding upon his conscience. The only theological difficulty with doing so is that Negre is no longer a Catholic if he denies that the teaching of the Pope is binding upon his conscience.

The binding character of the teaching of the Pope was reaffirmed so recently as November 21, 1964 in the Dogmatic Constitution on the Church (*Lumen Gentium*) by Paul VI and the Fathers of the Sacred Council:

"25. \* \* \* In matters of faith and morals, the Bishop's speech in the name of Christ and the faithful are to accept their teaching and adhere to it with a religious assent of soul. This religious submission of will and of mind must be shown in a special way to the authentic teaching authority of the Roman Pontiff, even when he is not speaking *ex cathedra*. That is, it must be shown in such a way that his supreme magisterium is acknowledged with reverence, the judgments made by him are sincerely adhered to, according to his manifest mind and will."

The teaching of the Pope is absolutely binding on all Catholics when he speaks *ex cathedra*:

"This is the infallibility which the Roman Pontiff, the head of the college of bishops, enjoys in virtue of his office, when as the supreme shepherd and teacher of all the faithful, who confirms his brethren in their faith (cf. Lk.22.32), he proclaims by a definitive act some doctrine of faith or morals."

The foregoing religious doctrine is not set out to persuade the court that it is theologically true or theologically false.<sup>1</sup>

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<sup>1</sup>"The religious views expoused by [petitioner herein] might seem incredible if not preposterous, to most people but if those doctrines are subject to trial before a [hearing officer of the Army or this court] charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake

Rather, we set out the foregoing doctrine to demonstrate simply that the government's assertion is untenable that under its construction of section 6(j) of the Selective Service Act "No religion is favored; none is discriminated against; none is established." (Brief for the United States p. 24).

The blunt fact is that if the Solicitor General's construction of section 6(j) is accepted by this court, none of this nation's 44 million odd Catholics is eligible for exemption from military service as a conscientious objector: Either the young man accepts the teaching of Vatican II, and the Popes that just wars may occur in which he has a duty to participate, or else the young man denies the authoritative teaching of the Popes and the Fathers of the Sacred Council. In the latter case the young man is no longer a Catholic, but has become a Protestant (namely one who protests the authoritative teaching of the Pope) as was pointed out by the Council of Trent in 1545-63.

It is up to this court to determine whether the First Amendment to the Constitution permits the blatant form of religious discrimination proposed by the government in the present case

## B.

Despite the uncontradicted and incontrovertible evidence that Negre's conscientious objection is rooted in his Catholic training and belief, the Army disapproved Negre's application for discharge upon the ground that his objection to service was based upon a "personal moral code." (N. App. 41). It is difficult to imagine what ground the Army could have had for such a determination unless it was an erroneous preconception that Catholicism is a personal moral code rather than a religion. Cf. *United States ex rel. Healy v. Beatty*, 424 F.2d 299 (5th Cir. 1970).

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that task, they enter a forbidden domain." *United States v. Ballard*, 322 U.S. 78 at 87 (1944).

Judge Zirpoli in March, 1969 sustained the Army's decision denying discharge. (N. App. 48). Less than a year later, however, Judge Zirpoli concluded that the discrimination against Catholics under the government's interpretation of section 6(j) violated Free Exercise, Due Process, and the No Establishment Clauses of the Constitution. *United States v. McFadden*, 309 F. Supp. 502 (N.D. Cal. 1970), pending on jurisdictional statement, No. 422 this Term.

The Ninth Circuit took pains to reject Negre's contention that his objections were based upon religious training and belief:

"Our analytical view of the record reveals that appellant has a personal moral code based upon his sociological and philosophical views, rather than a conscientious objection to participation in war in any form by reason of religious training and belief." (N. App. 51).

The government herein makes the same sort of conclusory assertion:

"Opposition to a particular war necessarily involves a political judgment, [citing a law review article] an individual conclusion that the policy adopted by the duly elected government is wrong at a certain time in relation to a particular area of operations. See *United States v. Kauten*, supra, 133 F.2d at 707. While the personal response to that determination may well be religiously and conscientiously motivated, it rests in the first instance on a decision that is political and particular. See generally, Comment, 34 U. Chi. L. Rev. 79, 102 (1966)." Brief for the United States pp. 24-25.

The government's assertion that Negre's beliefs are solely political fails the tests of logic, of history, and of support in the record.

In logic a total objector equally with a selective objector certainly will make the "judgment, an individual conclusion that the policy adopted by the duly elected government is wrong at a certain time in relation to a particular area of

operations." Any individual who concludes that a war to which his attention is directed violates the commands of God can scarcely be expected to applaud the political decision of his country to participate in the war. As the Fifth Circuit remarked:

"... disapproval of war in Viet-Nam or any other place is certainly consistent, rather than inconsistent, with conscientious objection to armed conflict. Really, if Kessler had said that he was a conscientious objector but nevertheless approved of any war this would have been such an inconsistency as to have undermined the sincerity of his religious objection to all wars." *United States v. Kessler*, 406 F.2d 151 at 155 (5th Cir. 1969).

A national decision to go to war is as much a political decision for the total pacifist as it is for the selective objector. Indeed many political decisions have a religious significance: For example the political decision to feed the hungry also expresses a religious duty of charity; a political decision to exterminate all members of a race or nationality would violate the religious views of many persons. The question under section 6(j) therefore is not whether the government decision to engage in war is political, but whether the individual's objection is based upon his religious training and belief, or arises solely from his politics. As noted in *Welsh v. United States*, 398 U.S. 333 at 340-341 (1970), the beliefs upon which objection is based must "function as a religion in [the individual's] life," and the exemption does not extend to those:

"Whose objection to war does not rest *at all* upon moral, ethical, or religious principle, but instead rests solely upon considerations of policy, pragmatism, or expediency." [Emphasis added]

Indeed every court that has considered the question including *Berman*, *infra*, has concluded that political, sociological, philosophical or personal moral objections to war do not



disqualify the objector who also has a religious basis for his objection to participation in war.<sup>2</sup>

The test Congress set in adopting section 6(j) was to recognize the individual's conscience where it reflected his view of obedience to God or the functional equivalent of such belief. Thus, the 1948 Act specifically adopted the definition of religion from Chief Justice Hughes dissent in *United States v. Macintosh*, 283 U.S. 605 at 633 (1931): "The essence of religion is a belief in a relation to God involving duties superior to those arising from any human relation." Congress further followed the explication of Justice Hughes' opinion in *Macintosh* from *United States v. Berman*, 156 F.2d 377 (9th Cir. 1946) that:

"... his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute." 156 F.2d at 381.

The court concluded:

"belief . . . based entirely upon a philosophical, social or political policy . . . does not entitle him to exemption from military duty." 156 F.2d at 382.

Thus, the man is not exempted from military service who concedes that the war does not violate any law of God or the functional equivalent in his life of the law of God, even though such individual may assert his belief that the war is unpragmatic, or that the war is inexpedient either for the country or for himself personally.

The Catholic's religious duty to obey conscience is scarcely a new doctrine of the Church. When told to stop preaching by the Sanhedrin, to which he was by law sub-

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<sup>2</sup>*Welsh v. United States*, 389 U.S. 333 at 340-341 (1970); *Packard v. Rollins*, 422 F.2d 525, 527 (8th Cir. 1970); *Pitcher v. Laird*, 421 F.2d 1272, 1280 (8th Cir. 1970); *United States ex rel. Sheldon v. O'Malley*, 420 F.2d 1344, 1349-50 (D.C. Cir. 1969); *United States v. Haughton*, 413 F.2d 736, 742 (9th Cir. 1969); *United States ex rel. Brooks v. Clifford*, 409 F.2d 700, 708 (4th Cir. 1969).

ordinate, "Peter replied for himself and the apostles, 'We must obey God rather than men.'" Acts of the Apostles 5:29. This contention that where conscience is in issue God must be obeyed has been axiomatic in Catholic teaching in every age.

Typical is the statement in the fourth century by St. Jerome, the author of the Latin Bible, who wrote, "If what the emperor and presiding officers command is good, obey the will of the commander. But if it is evil and against God, answer him with those words from the Acts of the Apostles, 'It is necessary to obey God rather than men.'" Jerome, *On Titus* 3:1, 26 *Patrologia Latina* 626 (Ed. J. P. Migne).

The obligation to follow conscience was put in positive terms by Pope Paul VI and the Fathers of the Second Vatican Council:

"On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience faithfully, in order that he may come to God, for whom he was created." *Declaration on Religious Freedom* 1:3, in *Documents of Vatican II* 681 (1966).

Nor is the duty of the common soldier to refuse participation in a war which does not meet the tests of his religion anything new in the Catholic religion.

The classic exposition of just war theory is that of Francisco Victoria, the Dominican master of the University of Salamanca from 1520 to 1540 and pioneer in international law. Victoria asks: "Are subjects bound to examine the cause for a war or may they fight without applying any diligence to this matter, as court officers carry out the decree of a judge without other examination?" Victoria begins his answer by pointing out, "If a subject is clear as to the injustice of a war he may not lawfully fight, even at the prince's command. This is obvious, for it is not lawful to kill the innocent by any authority whatsoever; and in

this case the enemy are the innocent. Therefore it is not lawful to kill them."

Victoria goes on to say that certainly senators and counselors of the prince are bound to examine the cause of the war, and then he asks if lesser folk are similarly obliged. He concludes that by reason of impossibility they are not bound personally to investigate the causes of a war, but he continues: "Nonetheless there can be such evidence and indicia of the injustice of a war that ignorance will not excuse even subjects of this kind if they fight." If they could be excused by looking away from the facts, so could the soldiers who crucified Christ. Victoria concludes to an obligation in this kind of case to look at the justice of the cause and not to fight in an unjust war. *Relectio VI de Indis, sive De jure belli Hispanorum in barbaros* 435-37 (ed. Simon in *The Classics of International Law*; 1917).

The most influential of all Catholic moral theologians, St. Alfonso de' Ligouri (1696-1787), treats of the soldier's duty under the general heading of the Fifth Commandment, "You shall not kill." He is categorical as to the obligation of the soldier who becomes certain that the war in which he is engaged is unjust: "A soldier, understanding that the war which he is in is unjust, cannot be absolved unless he wills to obtain as quickly as possible his dismissal, and meanwhile abstains from hostile acts." 3 Ligouri *Theologia moralis* no. 408 (1825). In other words, a soldier in this position is unable to receive the sacrament of Penance and the sacrament of the Eucharist unless he is attempting "as quickly as possible" (*quamprimum potest*) to obtain his release from the army.

In the standard *Baltimore Catechism*, the question is put, "What is the fifth commandment of God?" The answer given is "The fifth commandment of God is: Thou shalt not kill." Developing the answer, the Catechism then makes an exception for "a soldier fighting a just war." *Baltimore Catechism* 147-48 (Official Revised Edition; 1949).

The teaching of the Catholic church has been consistent for nearly two thousand years in affirming the primary duty of man to follow conscience as the voice of God, and to refuse to kill where taking life violates conscience. If in the heat of defense of a much-criticized war the government can prevail with its contention that these teachings of the Catholic church are "political" rather than "religious," one can only wonder what life is left in the freedom of religion guaranteed by the First Amendment which has been the pride of the American commonwealth for nearly two centuries.

### C.

Failing in its contentions that the teaching of the Catholic church of obedience to conscience is "political" and not religious, and that coercing objectors into disclaimer of obedience to the teaching of the Church and the Pope is not discriminatory against Catholics, the Brief for the United States summons up a number of supposed difficulties which are said to justify government discrimination against Catholic conscientious objectors in administration of the draft.

First the government brief asserts (p. 26) that the exemption would be hard to administer because the views of individuals would be "changeable". Friends are free to change their mind and participate in war, and many have taken part in war. Indeed the subscribers to the Oxford Oath of the 1930's who refused participation in World War II were by all accounts far fewer than the subscribers who changed their mind and took part in the war in the front lines. Then the selective objector is charged with being "subjective." (Brief for the United States p. 26). That observation is a tautology: The Friend's adoption of his religion is as "subjective" as the Catholic's. Indeed, it is more subjective insofar as traditional Friend teaching is that light comes directly from God to the individual, rather than being refracted through an institutional church

which announces doctrines binding upon all of the faithful.

Next the government speculates that local boards and the military will be required "to defer to any individual's unexplained assertion (on sincere 'religious' grounds) that he chooses not to serve . . ." (Brief for the United States p. 27). *United States v. Seeger*, 380 U.S. 163 at 185 (1965) dismissed that contention:

"But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector. The Act provides a comprehensive scheme for assisting the Appeal Boards in making this determination, placing at their service the facilities of the Department of Justice, including the Federal Bureau of Investigation and hearing officers."

Finally, the government speculates that recognizing Catholic conscientious objection, and that of others who object on religious grounds to unjust wars as defined in their religion "would necessarily hinder the achievement of the basic objection of the Selective Service System—to raise necessary military manpower for the national defense . . . ." (Brief for the United States, p. 28).

The foregoing contention ignores the historical fact that Catholics, though bound by the just war doctrine and obedience to conscience taught by their Church for millenia, have not been notably persuaded in any numbers that their government embarks upon unjust wars. Of the 21,785,000 men of draft age in 1969 only 25,000—.11%—were classified as conscientious objectors. *Statistical Abstract of the United States 1970* p. 262. By any rational estimate the number of men available and willing to serve.

President Johnson reported to Congress in 1967:

"A decade ago, about 70% of the group eligible for duty had to serve with the Armed Forces to meet our military manpower need.

"Today, the need is for less than 50%, and only about one-third or less of this number must be involuntarily inducted—even under the conditions of war." 111 Cong. Rec. 5404 at 5476.

If great numbers of men refuse military service, Congress may want to consider revoking the conscientious objector exemption altogether.<sup>3</sup>

As an afterthought the government brief suggests that if the courts recognize Catholic or selective conscientious objection, the next thing to happen will be a general refusal to pay taxes. The short answer is that Congress has seen fit to exempt religious objectors to participation in war, and has not seem fit to exempt from tax payments those who have religious objection to paying taxes if any such there are. By contract legislators from colonial times have consistently recognized the religious claim to exemption from military service to those opposed to taking life. The reasons for the distinction are self evident: The commandment "you shall not kill" (sometimes translated "you shall not murder") is taken in Judea-Christian religions as divine revelations—a command directly from God. Life is viewed as given by God. The taking of life is viewed as one of the most serious acts conceivable, placing man in jeopardy of violating God's directly revealed word.

Congress has always recognized that granting recognition of important religious claims as an accommodation of freedom of religion does not in logic or experience compel Congress to exempt religious persons from each and every

<sup>3</sup> If most persons refuse military service, some members of government might consider whether the national policy so rejected by a majority of young men correctly reflects the consensus of the people who are sovereign in a democracy.

law passed by Congress. Moreover, where legislatures have exempted churches from paying taxes, it would be manifestly unconstitutional to deny exemption to the Catholic Church for teaching just-war doctrine while extending such exemption to churches which teach toward passivism, or which teach toward obedience to the state.

As will appear in the next section the founding fathers and Congress have consistently recognized conformity to define command in refusing to take part in war as a proper subject of religion deserving of recognition by government.

## II. NOTHING IN THE HISTORY OF THE SELECTIVE SERVICE ACTS SUPPORTS THE INTENTION OF CONGRESS ASSERTED BY THE GOVERNMENT HEREIN TO DISCRIMINATE AGAINST CATHOLIC CONSCIENTIOUS OBJECTORS.

The government contends that Congress intended to deny exemption from military service to men prohibited therefrom by conscience formed under religious training and belief which forbids participation in wars defined as "unjust" by application of various tests fixed by their religion.

In support of this proposition the government relies solely (with one exception) upon the history set out in the brief for the government in *United States v. Seeger*, 380 U.S. 163 (1965). Upon reading that brief the history contradicts the government position herein. For case authority the government relies upon *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943) which Congress in 1948 rejected in favor of *United States v. Berman*, 156 F.2d 377 (9th Cir. 1946). The Supreme Court in *Sicurella v. United States*, 348 U.S. 385 (1955) likewise rejected the *Kauten* construction that the conscientious objector must object to "war in any form" and held it sufficient that the conscientious objector object to "participation in any form" in war.

Upon examination it appears that point I of the government brief herein is contradicted by the Congressional history it refers to, and that the case authority the government relies upon has been rejected both by Congress and by the Supreme Court.

With the exception of Senator LaFollette's proposal in World War I to exempt persons of German and Austrian ancestry with "conscientious objections" against going "into service to fight against their own kith and kin \* \* \* " (Brief for the United States p. 16), the government relies solely for its Congressional history upon the government brief in *United States v. Seeger*, No. 50 O.T. 1964, and *Selective Service System Monograph No. 11, Conscientious Objection* (1950).

But the government brief in *United States v. Seeger* at page 35 concluded:

"The core of the exemption for conscientious objectors is the unwillingness of the Congress, speaking the true will of the American people, to punish as a criminal a man who refuses to perform military service in obedience to what he believes is the command of God transmitted by divine revelation. The unwillingness of the American people to compel a man to disobey a divine command and yield to a human obligation imposed by government is older than the Nation."

Proceeding to the history outlined at pages 41-72 we find that a number of colonies jailed, or subjected to heavy taxes or fines those who refused to render military service. When these measures failed to persuade religious objectors to disobey the word of God as perceived in their conscience, a number of colonies recognized religious conscientious objection such as Massachusetts in 1661, Rhode Island in 1673 and Pennsylvania in 1757. (Id at 42).



The Continental Congress in 1775 resolved:

"As there are some people who from Religious Principles cannot bear Arms in any case, this Congress intend no Violence to their Consciencies, but earnestly recomment it to them to Contribute Liberally, in this time of universal calamity, to the relief of their distressed Brethren in the several Colonies, and to do all other services to their oppressed country, which they can consistently with their Religious Principles." *Selective Service System Special Monograph No. 11, 1 Conscientious Objection 33-34 (1950).*

The Solicitor General fastens upon the phrase "people who from Religious Principles cannot bear Arms in any case" as evidence of an intent to discriminate against Catholics and other just war objectors. (Brief for the United States p. 15).

But he cites no debate, correspondence or evidence to support that interpretation. In the first place the Continental Congress did not limit its resolution to those "who from Religious Principles cannot bear Arms in all cases of war, present or future, real or speculative . . . ."

It is more to the point however to remark the actual history of religious toleration in the colonies. For the colonial assemblies were well aware how to write religious intolerance into law. The Massachusetts Bay Colony hanged four Friends who refused to desist from teaching their religion. In Maryland the Baron Baltimore (a Catholic) in April 1649 Adopted the Act of Toleration which provided in part:

"And whereas the inforceing of the conscience in matters of Religion hath frequently fallen out to be of dangerous Consequence in those commonwealths where it hath been practised . . . Be it Therefore . . . enacted . . . that noe person or psons [sic] whatsoever within this Province . . . professing to believe in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced

for or in respect of his or her religion nor in the free exercise thereof." Quoted in John Tracy Ellis, *American Catholicism* p. 38 (Image Books Edition 1965).

But the American colonies could not remain immune from the bitter religious warfare taking place in Great Britain. In 1654 the Puritans took control of the Maryland assembly, repealed the Act of Toleration and outlawed the Catholics. Ten Catholics were condemned to death, four were executed, the houses and estates of the Catholic clergy were taken, and the Catholic priests were forced to flee to Virginia. *Ibid.* Catholics in New York suffered similar discrimination. *Id* at 41. Catholics were subjected to penal laws in eight out of the thirteen colonies. The Continental Congress in 1774 adopted the anti-Catholic Suffolk Resolves, and wrote to George III their astonishment that Parliament by the Quebec Act of 1744 established for Canada the Catholic religion "that has deluged your island in blood, and dispersed impiety, bigotry, murder and rebellion through every part of the world." *Id.* at 45.

What carried the day for religious toleration was not a sudden access of insight into the ethical desirability of religious toleration. Rather more practical considerations were involved. General Washington was seeking the assistance of Canadians, Catholics, and in November, 1775 wrote his troops who prepared to burn the pope in effigy on Guy Fawkes Day:

"To be insulting to their Religion, is so monstrous as not to be suffered or excused." *Id* at 45-46.

Father John Carroll, later the first Catholic bishop in the United States, was deputed by the Continental Congress to seek help from the Canadians. The colonies signed an alliance with France, a Catholic country, in 1778; and Catholics served in the Continental Congress from Maryland (Daniel Carroll) and Pennsylvania (Thomas Fitzsimmons). *Id* at 47.

The same two Catholics served in the Constitutional Convention and were rather outspoken in favor of religious toleration as ultimately adopted in the First Amendment. President Washington wrote Father John Carroll in 1790 upon his departure to England to be consecrated as the first American bishop. Washington expressed his hope that America would be among the foremost nations of the world in respect of religious tolerance, and concluded with the pragmatic observation:

“And I presume that your fellow citizens will not forget the patriotic part which you took in the accomplishment of their Revolution, and the establishment of their government; nor the important assistance which they received from a nation in which the Roman Catholic Religion is professed.”  
Id at 48-49.

It was therefore most improbable that the First Amendment drafted just at the time when Catholics first had attained general toleration in the colonies was intended to sanction punishment of Catholics—in the field of military service or any other—merely because the Catholics followed their traditional acceptance of the authority of the teaching of the Pope and the Church in matters of faith and morals.

Continuing in American history, anti-Catholic sentiment recurred from time to time as in the Know Nothing Party and the American Protective Association. In a year marred by anti-Catholic riots, Abraham Lincoln declared himself for religious tolerance by offering a resolution at a Whig Meeting:

“Resolved, that the guarantee of rights of conscience, as found in our Constitution, is most sacred and inviolable, and one that belongs no less to the Catholic, than to the Protestant; that all attempts to abridge or interfere with these rights, either of Catholic or Protestant, directly or indirectly, have our decided disapprobation and shall ever have our most effective opposition.” John Tracy Ellis, *American Catholicism* p. 69.

In the Civil War pragmatism again joined with principle in support of religious toleration. President Lincoln commissioned Archbishop Hughes of New York to go to France to attempt to persuade Napoleon III to neutrality. The Confederacy commissioned Bishop Lynch of Charleston to visit Europe with the opposite intent. *Id.* at 95-96. Thus, in the Civil War neither views of President Lincoln in favor of religious toleration, nor the political realities of the moment suggested any intent to discriminate against Catholic conscientious objectors because their Church taught a just war doctrine rather than total pacifism.

In World War II Congress confined its exemption to members "of any well-recognized religious sect . . . whose existing creed . . . forbid its members to participate in war in any form . . ." 40 Stat. 78. Again, Congress did not display any intent to compel Catholic objectors to violate their duty of obedience to God as perceived in conscience. Rather Congress was concerned to distinguish the bona fide religious objector "without opening the doors to every slacker who, without any sincere and long-established convictions might declare also his so-called 'conscientious scruples' in order to avoid service." 55 Cong. Rec. 1478-1479.

In the present case, Negre was born, baptised, raised and educated as a Catholic and was found by the Army hearing officer to be very devout. His Catholic convictions are both "sincere and long-established."

Turning to the present section 6(j) of the Selective Service Act, Solicitor General Cox noted in his Seeger brief at pp. 70-71:

"[*Berman v. United States*, 157 F.2d 377, certiorari denied, 329 U.S. 795] reiterated this point by quoting (*id.* at 381) from the dissent of Chief Justice Hughes (with Justices Holmes, Brandeis, and Stone concurring) in *United States v. Macintosh*, 283 U.S. 605, 633:

'The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.'

"Both the *Berman* and *Kauten* decisions were before Congress when the present statute was adopted in 1948. Congress signified that *Berman* constituted the correct interpretation of its views by adopting the definition of 'religious training and belief' which the Ninth Circuit had borrowed from *Macintosh* and saying, as to the exemption provision (S. Rep. No. 1268, 80th Cong., 2d Sess. 14):

'This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman*, 156 F.2d 377, certiorari denied, 329 U.S. 795.) [Emphasis added].'

The present Solicitor General seeks to avoid the fact that the present section 6(j) was virtually copied from Chief Justice Hughes' dissent in *Macintosh* by confining his discussion of the case to a footnote and saying that *Macintosh* was an immigration case. (Brief for the United States p. 19, footnote 12).

That Chief Justice Hughes expressed his views in an immigration case, *Macintosh*, is hardly a distinction since Congress saw fit to adopt his views by copying his language in the Selective Service Act of 1948. Within the immigration field the Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946) overruled the majority opinion in *Macintosh*.

Chief Justice Hughes' opinion in *Macintosh* was highly sensitive to the religious issue. The crux of his opinion is the long history of Congressional recognition that "in the forum of conscience, duty to a moral power higher than the state has always been maintained. \* \* \* the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." 283 U.S. 605 at 633.

Chief Justice Hughes does not in his opinion share the government's present contention, that obedience to God by the Catholic refusing military service should be punished while obedience to God by a member of a sect asserting total pacifism is to be sanctioned. Rather, Chief Justice Hughes emphasizes:

"It goes without saying that it was not the intent of Congress in framing the oath to impose any religious test." 283 U.S. at 631.

Continuing, Chief Justice Hughes declared:

"Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. \* \* \* there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." 283 U.S. at 635.

The government in the present case thus finds itself making the curious contention that when Congress adopted the language of Chief Justice Hughes in *Macintosh* in the 1948 Act, that Congress was so inept that it intended the result opposite that proposed by Chief Justice Hughes.

Finally, we note that the Selective Service in 1943 recognized the religious basis of Catholic conscientious objection as deriving from conscience:

"We recognize at the basis of conscientious objection, the very simple statement of the New Testament: 'It is better to obey God rather than man' It might be invincible ignorance or misunderstanding or emotion, but if the individual regards his acts as his answer to a call from God or as God's will, in accordance with his religious training and belief, then the Nation in accordance with its tradition, feels bound to recognize it.

\* \* \* It was argued, for example, that a member of the Catholic church could not possibly have a basis for conscientious objection.

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"After much consideration we adopted a more liberal view, based upon a conclusion that the definitions of religion and the variety of religious experience are so nearly infinite in number as to make futile any attempt to say whether this or that one met the law. The practical effect of this decision was to say that conscientious convictions held by a man reared in the environment of a religious civilization and exposed, if only subjectively, to its ethical concepts, have their roots in the same soil from which spring religious convictions, and furnish evidence from which may be drawn the inference that he recognizes a Deity or a power above and beyond the human. This view has prevailed." Selective Service in Wartime, Second Report of the Director of Selective Service, 1941-42 256, 258 (April 3, 1943)."

The foregoing passage is instinct with recognition of the dilemma of the Catholic objector that despite his customary duty of obedience to the state, he has an overriding religious duty to follow his conscience and to refuse military service in an unjust war, even though others judge him to be objectively mistaken. In such a case where the individual has carefully and prayerfully formed his conscience, the Church teaches that the individual is free from moral fault, and his objective error is not judged by God to be error, but rather is excused as invincible ignorance.

The generous spirit of religious tolerance recognized by General Hershey and the Selective Service System in 1943 in an hour of supreme national crisis conforms much better to the great American tradition of a free people in a free country, than the rather ungenerous interpretation asserted by the government in the present case.

## CONCLUSION

For the reasons stated, section 6(j) should be construed to grant Catholic objectors exemption from military service despite the Catholic teaching of the just war doctrine. If section 6(j) will not bear that construction, then it should be declared unconstitutional.

Dated: December, 1970.

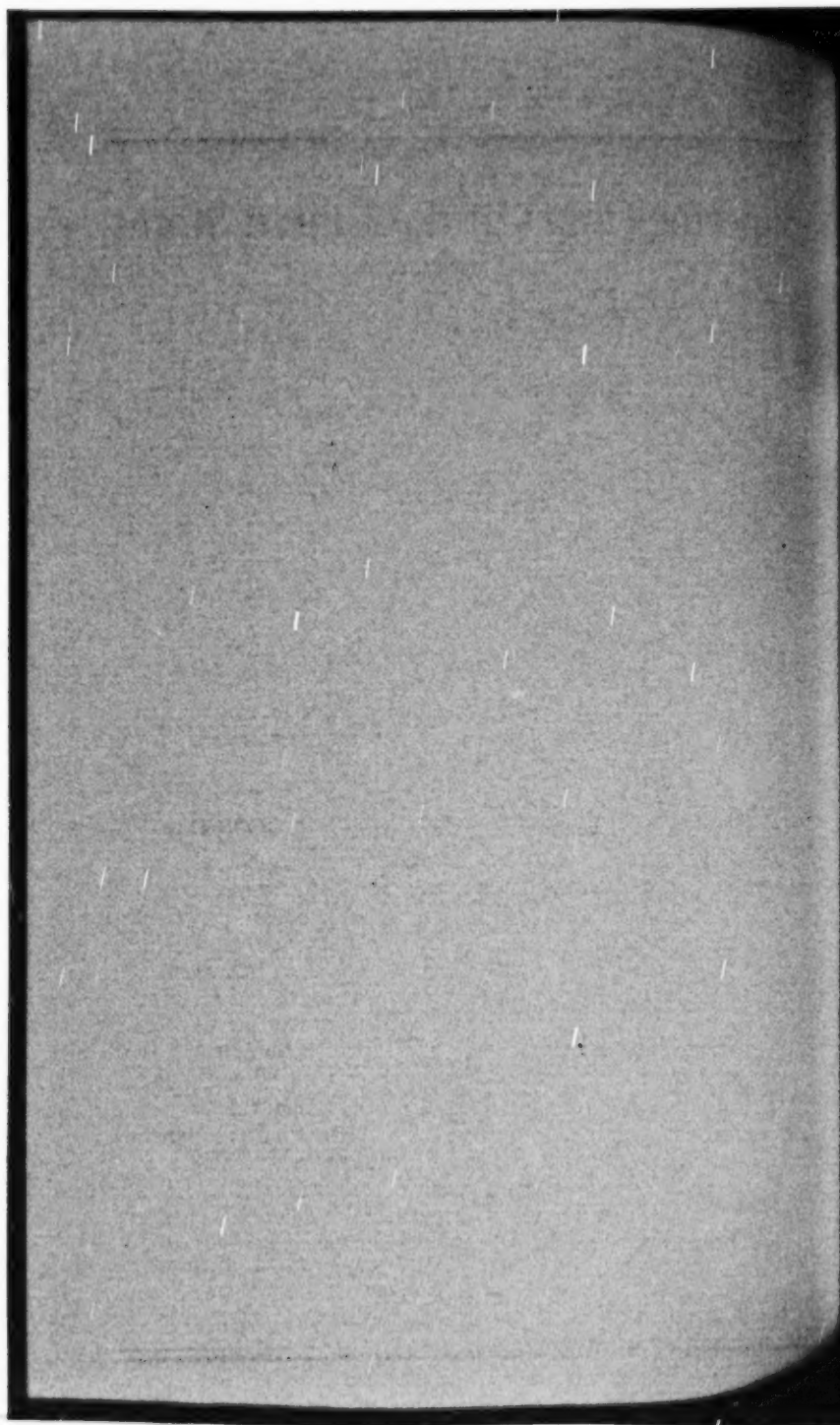
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